

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BARBARA WILLIAMS

Claimant

VS.

VALU MERCHANDISERS CO.

Self-Insured Respondent

Docket No. **1,050,567**

ORDER

Claimant requests review of the March 10, 2011 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

RECORD

The record on appeal consists of the transcript of the October 4, 2010, Preliminary Hearing and exhibits; the transcript of the June 10, 2010, deposition of Barbara Williams; the transcript of the February 18, 2011, deposition of Natalie Dugan; the transcript of the February 18, 2011, deposition of Karen Loden; the transcript of March 4, 2011, deposition of David Turner and exhibits; the transcript of March 4, 2011, deposition of Kevin Addington and exhibits; and, the transcript of the March 7, 2011, Preliminary Hearing and exhibits, together with the pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) determined that although claimant suffered accidental injury arising out of and in the course of employment, she failed to give timely notice. The ALJ further determined claimant knew she had suffered an injury to her back on March 18, 2010, but she waited until April 22, 2010, to notify respondent of an accidental injury at work. The ALJ also concluded that claimant did not establish just cause for her failure to notify respondent within 10 days of her injury. Consequently, the ALJ denied claimant's request for medical treatment and temporary total disability compensation.

The claimant requests review of whether she provided timely notice of her accidental injury. Claimant argues she notified her supervisor of the injury on both the day of the accident and the following day. Claimant also argues that she did not know what was wrong with her until after an MRI confirmed a disk problem. Accordingly, claimant

argues she met her burden of proof to establish that she gave timely notice of her injury within 10 days. In the alternative, claimant argues she was unsure of the severity of her injury until after her MRI and she then gave notice which was within 75 days of her injury.

Conversely, respondent argues claimant never advised respondent that she had suffered a work-related injury on March 18, 2010, until April 22, 2010. Moreover, respondent notes when claimant initially sought treatment on her own on March 19, 2010, she provided the doctor with a history of no injury or trauma. The day following the alleged accident, the claimant's employment with respondent was terminated for exceeding the number of points for absences and tardiness. Respondent further argues claimant never provided notice of a work-related injury during discussions regarding her termination. Respondent finally argues the claimant neither provided timely notice nor just cause for her failure to provide notice within 10 days and requests the Board to affirm the ALJ's Order. In the alternative, respondent argues claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment.

The sole issue raised on appeal is whether claimant gave respondent timely notice of accidental injury as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

This Board Member finds that the ALJ's Order sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. It is not necessary to repeat those findings and conclusions in this order. Therefore, this Board Member adopts the ALJ's findings and conclusions as if specifically set forth herein.

Briefly stated, claimant's job with respondent required her to pick products to be placed into totes for delivery to different stores. Claimant alleged that she injured her back while lifting one tote to stack on top of another. She testified that she told her supervisor who ignored her. The following day she was in such pain that when she reported to work she sought Sue Scott, her supervisor, to see about seeking light-duty work. Claimant testified that she again told Ms. Scott that she had hurt her back at work the previous day. Ms. Scott and Brandon Peck met with claimant to discuss her request because she was so close to termination due to absences. Both Ms. Scott and Mr. Peck testified that during the conversation claimant alleged a preexisting personal condition was causing her problems but she did not mention a work injury. Claimant was advised that if she needed to go to the doctor but returned to work for a half day she would not be terminated. But after going to the doctor claimant only returned an off work slip and as a result of not working she was terminated due to the respondent's point policy for absences.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

As noted above, there is conflicting testimony in this case. The claimant and her supervisor as well as Mr. Peck all testified in person before the ALJ. There is contradictory testimony regarding whether claimant provided timely notice of the work-related injury within 10 days. Thus, credibility is at issue. The ALJ had the opportunity to assess the witnesses' demeanor. In this case, the ALJ did not believe the claimant and specifically determined that claimant's supervisor, Ms. Scott, was believable. Consequently, the ALJ determined respondent was not provided timely notice of claimant's March 18, 2010 accidental injury. Under this circumstance, where conflicting testimony exists, some deference should be given to the ALJ's evaluation of the witnesses' credibility. This Board Member, therefore, taking into consideration the ALJ's opportunity to assess the witnesses' credibility, affirms the ALJ's decision that claimant failed to give timely notice of the March 18, 2010 work-related injury.

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.

(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

The ALJ further concluded claimant failed to establish just cause for enlargement of the notice period to 75 days. In this instance, claimant's accident was a sudden and traumatic event on March 18, 2010. The incident caused pain which led claimant to seek medical treatment the next day. Initially, claimant failed to provide the doctor a history of injury or trauma. And even during conversations regarding her termination claimant still failed to provide notice of a work-related injury. The ALJ determined such action does not constitute just cause to extend the notice time to 75 days. This Board Member agrees and finds claimant has failed to prove that notice was provided in a timely fashion and he further failed to show just cause for the delay in providing notice to respondent of this alleged accidental injury. Moreover, it is inconsistent to allege that notice was provided for a specific injury and then to argue that there was just cause for the failure to provide notice.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated March 10, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Brad E. Avery, Administrative Law Judge

¹ K.S.A. 44-534a.

² K.S.A. 2010 Supp. 44-555c(k).